UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 17 Civ. 5131 (RJS)

DAVID LANE JOHNSON,

Plaintiff,

VERSUS

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION *ET AL.*,

Defendants.

MEMORANDUM AND ORDER
October 3, 2018

RICHARD J. SULLIVAN, District Judge:

Plaintiff David Lane Johnson, a professional football player who was suspended for ten games after testing positive for a performance-enhancing substance, brings this action to vacate the arbitration decision that upheld his suspension. Johnson also brings claims against the National Football League Management Council ("NFLMC") and his union, the National Football League Players Association ("NFLPA"), alleging that the NFLMC violated its collective bargaining agreement with the NFLPA and that the NFLPA violated its duty of fair representation and its duty to provide documents in connection with the arbitration proceedings. Now before the Court is Johnson's petition to vacate the arbitration award and the NFLPA's motion to dismiss that petition and Johnson's complaint. For the reasons set forth below, the NFLPA's motion to dismiss is granted in part and denied in part, and Johnson's petition to vacate the arbitration award is denied.

I. BACKGROUND

Since 2013, David Lane Johnson has been an offensive tackle for the National Football League's Philadelphia Eagles.[1]

[1] The facts set forth below are taken from the First Amended Complaint (Doc. No. 39 ("Compl.")), statements or documents incorporated into the complaint by reference, and documents upon which Plaintiff relied in bringing the suit. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). In ruling on the instant motion, the Court has also considered the briefs in support of and in opposition to Johnson's petition to vacate the

(Compl. ¶ 19.) Johnson's terms of employment are governed by a collective bargaining agreement that was negotiated by the NFLPA, the exclusive bargaining representative of professional football players employed by the NFL. (*Id.* ¶¶ 2, 20, 23.) The NFLMC is the NFLPA's counterpart; it represents the separately-owned NFL teams in collective bargaining and labor relations. (*Id.* ¶¶ 4, 22.)

A. The Collective Bargaining Agreement and the 2015 Policy on Performance-Enhancing Substances

The current collective bargaining agreement negotiated by the NFLPA and the NFLMC went into effect on August 4, 2011 and will remain the governing collective bargaining agreement until the last day of the 2020 League Year. (*Id.* ¶ 22.) In addition to this general agreement, the NFLPA and the NFLMC have negotiated specific policies governing the use of performance-enhancing substances. (*Id.* ¶ 24.) Relevant to this dispute is the "2015 Policy on Performance-Enhancing Substances." (*Id.* ¶ 24; see also Doc. No. 39, Ex.1 (the "Policy").)

The 2015 Policy establishes the rules governing the use of performance-enhancing substances in the NFL. (*Id.* ¶ 27.) To that end, the Policy identifies banned substances, sets forth the testing procedures for detecting violations of the Policy, establishes disciplinary practices to be followed in the event of a violation, and provides for an appeal if a player is dissatisfied with the disciplinary process. (*See* Policy §§ 3, 4, 9, 10, 11.)

Several Policy provisions are important to Johnson's case. First, the Policy establishes certain circumstances under which a player can be tested for a prohibited substance. (Compl. ¶ 27.) The "types of testing" include pre-employment, annual, preseason, regular season, postseason, off-season, and, relevant here, for "reasonable cause." (Policy § 3.1.) A player can be designated by the Independent Administrator – an individual jointly selected by the NFLPA and the NFLMC to administer the Policy – for reasonable-cause testing for a variety of reasons, including a previous positive test result for a prohibited substance, as well as a determination that there exists "credible, verifiable documented information" providing "a reasonable basis to conclude" that a player "may" have violated the Policy. (*Id.* §§ 2.1, 3.1.) A player who is placed into reasonable-cause testing must remain in the program for at least two years or two full seasons (whichever is shorter), and must be discharged thereafter unless the Independent Administrator notifies the player in writing that he will remain in the program subject to review at a later date. (*Id.* § 3.1.) If a player is placed into the program for a reason other than a violation of the Policy, he is not subject to the two-year minimum placement and may be discharged at any time, provided that he is advised in writing on an annual basis if the Independent Administrator determines that he should remain in the program. (*Id.*)

Second, the Policy establishes the procedures for testing a player for the use of a prohibited substance. (*Id.* §§ 3.2, 3.4.) Specifically, the Policy empowers the Independent Administrator to "determine the most appropriate laboratory . . . to perform testing under the Policy." (*Id.* § 3.4.) The Policy also obliges a player to comply with all testing requirements, stating that any

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arbitration award (Doc. Nos. 111, 113, 116, 117, 118), and the briefs in support of and in opposition to the NFLPA's motion to dismiss the petition to vacate the arbitration award (Doc. Nos. 109, 112, 119).

failure or refusal to appear for testing, or to "cooperate fully in the collection process," will lead to disciplinary action. (*Id.* § 3.3.)

Third, the Policy sets the procedures to be applied in the event of a positive test for a prohibited substance. (*Id.* § 4.) When a player provides a specimen, that sample is divided into an "A" sample and a "B" sample. (*Id.* § 4.2.) If the Chief Forensic Toxicologist certifies that the "A" sample has tested positive for a prohibited substance, then the "B" sample will be tested to confirm the results. (*Id.*) Importantly, Section 4.2 of the Policy sets out the procedures for testing the "B" sample and provides that the player may elect to have an independent toxicologist "observe" the "B" sample analysis. (*Id.*) The Policy requires that a technician other than the one who tested the "A" sample test the "B" sample, but the test must occur in the same laboratory. (*Id.*)

Fourth, and rather straightforwardly, the Policy describes the penalties for players who test positive for prohibited substances. (Policy § 6.) In particular, the Policy sets the number of regular and postseason NFL games for which a player may be suspended, without pay, for violations of the Policy. (*Id.*)

Fifth, Sections 9, 10, and 11 of the Policy define the appeals process available to any player wishing to challenge the disciplinary decision. Relevant to Johnson's case, Section 9 governs the selection of arbitrators; Section 10 establishes the process for appealing the decision of the NFLMC; and Section 11 defines the burdens and standards of proof to be used during the appeal, as well as discovery obligations. Collectively, these sections define the scope of procedural protections afforded to an NFL player who is disciplined under the Policy, imposing obligations on both the NFLPA and the NFLMC in order to ensure the fairness of the appeals process.

Under Section 11 of the Policy, the NFLMC must at all times carry the burden of establishing a positive test result pursuant to a test authorized by the Policy and conducted in accordance with the requirements and procedures outlined therein. However, even if a player alleges a deviation from the prescribed procedures, the NFLMC can still carry its burden by demonstrating that: "(a) there was no deviation; (b) the deviation was authorized by the Parties; or (c) the deviation did not materially affect the accuracy or reliability of the test result." (*Id.* § 11.)

Finally, Section 16 of the Policy governs the procedures used to retain and destroy specimens used for testing. (*Id.* § 16.) In particular, that section obliges the Independent Administrator and Chief Forensic Toxicologist to work with the testing laboratories to develop procedures for the handling of players' specimens after they have been tested to ensure that the samples are destroyed at the appropriate time. (*Id.*)

B. Johnson's Discipline and Substance Testing

On April 23, 2014, Johnson was tested for performance-enhancing substances under the policy in effect prior to the 2015 Policy. (Compl. ¶ 42.) On May 19, 2014, he was notified by letter that his test was positive and that he would be subject to reasonable-cause testing. (*Id.*) The first reasonable-cause program test of Johnson took place on August 18, 2014, and he was tested at varying intervals thereafter. (Doc. No. 39, Ex. 2 ("Award") ¶ 6.7.)

Approximately a year later, the position of Chief Forensic Toxicologist described in Policy Section 2.2 fell vacant due to the retirement of Dr. Bryan Finkle, who had occupied that role. (Compl. ¶ 97.) The position remained vacant, and, in the interim, the NFLPA and NFLMC agreed that Dr. Anthony Butch, Director of the UCLA Olympic Analytical Laboratory, would fill the role of the Chief Forensic Toxicologist by certifying the analysis of "B" samples. (Award ¶¶ 6.25–6.26.)

On July 11, 2016 – more than two years after Johnson was first notified by letter that he would be subject to reasonable-cause testing, but less than two years after his first reasonable-cause program test – Dr. John A. Lombardo, the Independent Administrator of the 2015 Policy, directed Johnson to submit to another reasonable-cause test, and Johnson complied with his request, providing a urine sample the following day. (Compl. ¶¶ 8, 47.) Later that month, on July 28, 2016, Dr. Lombardo notified Johnson that the "A" sample had tested positive for a prohibited substance. (*Id.* ¶ 48.) Johnson exercised his right under the Policy to have the "B" sample tested to confirm the results, and he notified Dr. Lombardo that he had retained Dr. Michael D. Levine, an independent toxicologist, to observe the testing of the "B" sample as provided for by the Policy. (*Id.* ¶¶ 7, 49.)

On August 13, 2016, Dr. Levine requested from Dr. Lombardo copies of materials relating to the testing laboratory's procedures, but two days later, Dr. Lombardo denied the request, writing to Dr. Levine: "No laboratory policy or procedures are made available to the observing toxicologist." (*Id.* ¶¶ 50, 51.) Even though Dr. Levine subsequently complained to Dr. Lombardo that his ability to "effectively observe and evaluate the B sample test" was "compromise[d]" without those additional materials, they were never provided to him. (*Id.* ¶ 52.) Indeed, according to Johnson, "Lombardo and/or the NFLMC instructed" Dr. Butch to withhold the requested materials from Johnson's retained toxicologist. (*Id.* ¶ 54.)

Also on August 13, 2016, ESPN published an article quoting Johnson, who complained about the inadequacy of the NFLPA's representation with regard to the 2015 Policy. (*Id.* ¶ 123.) Two days later, the *Philadelphia Inquirer* published an article in which Johnson again complained about the NFLPA's failure to represent him concerning the prohibited substance testing. (*Id.* ¶ 124.) ESPN subsequently reported that the NFLPA objected to Johnson's allegations in a media statement, calling Johnson's statements inaccurate, reaffirming that "[w]e always stand up for the rights of our players," and stating that "we have been in touch with both [Johnson] and his agent, who now understand the facts." (*Id.* ¶ 125.) Johnson denies that he or his agent were contacted by the NFLPA about the subject of the ESPN report. (*Id.* ¶ 126.)

Johnson's "B" sample was tested by the UCLA Olympic Analytical Laboratory on August 19, 2016, which confirmed the toxicologist's original conclusion – that Johnson had tested positive for a prohibited substance under the 2015 Policy. (*Id.* ¶¶ 53–54.) Notwithstanding Johnson's protestations that the "B" sample was not analyzed "by a technician other than the one performing the 'A' confirmation test," as required by the Policy (*id.* ¶ 55), the NFLMC suspended Johnson without pay for ten games on September 6, 2016, pursuant to the Policy (*id.* ¶ 56).

C. Johnson's Appeal of the September 6, 2016 Suspension

Two days after learning of his suspension, Johnson appealed the NFLMC's decision. (*Id.* ¶ 57.) As part of the appeals process, Johnson requested information from the NFLMC, including information about how the arbitrators were selected, the Section 16 retention and destruction procedures, his history of reasonable-cause testing, the dates he was placed in reasonable-cause testing, and the identity of the Chief Forensic Toxicologist. (*Id.* ¶ 58.)

In compliance with the Policy's requirement that an appeal hearing occur "on the fourth Tuesday following issuance of the notice of discipline" (Policy § 10), the NFLMC scheduled the hearing to occur on Tuesday, October 4, 2016 in front of James Carter, an attorney with the WilmerHale law firm. (Compl. ¶¶ 6, 60.) Although Section 9 of the Policy required that an arbitrator be selected from a pool of three arbitrators, at the time Arbitrator Carter was selected, the pool consisted of only two such arbitrators. (*Id.* ¶ 61.) The Policy also required that a Notice Arbitrator, tasked with the scheduling and assignment of appeals, be selected by the arbitrators. (Policy § 9.) At the time of Arbitrator Carter's selection, the Notice Arbitrator had been chosen by the NFLMC and the NFLPA, rather than by the other arbitrators, and the NFLPA and NFLMC, rather than the Notice Arbitrator, handled the scheduling and assignment of appeals. (Compl. ¶¶ 61–62.) At the time of his selection, Arbitrator Carter also served as an arbitrator under a separate NFL/NFLPA policy, and his law firm, WilmerHale, represented the NFL in other matters. (*Id.* ¶¶ 174–190.)

Because the NFLMC did not provide Johnson with the materials he requested prior to the hearing, the Arbitrator held a discovery call on September 22, 2016. (*Id.* ¶ 63; Award ¶ 4.5.) The Arbitrator thereafter declined to direct the NFLMC to produce the requested documents, which included the testing laboratory protocols originally sought by Johnson's retained toxicologist, Dr. Levine. (Compl. ¶ 63.)

Prior to the hearing, Johnson submitted his Basis for Appeal, which set forth a series of arguments for the vacatur of his suspension. (Award ¶ 5.1 (citing Doc. No. 109, Ex. C).) First, Johnson argued that the NFL could not meet its initial burden of establishing the validity of the test result because the test was not authorized by the Policy, citing a violation of the two-year limitation on reasonable-cause testing as well as the improper collection and analysis of his test. (*Id.*) Among these alleged improprieties, Johnson asserted the fact that his test results were certified by someone other than the designated Chief Forensic Toxicologist; that his sample was destroyed prior to final adjudication of the appeal; that the B sample analysis was conducted by "improper" personnel; and that the NFLMC refused to provide Johnson's observing toxicologist with laboratory protocols. (*Id.*) Johnson also set forth an affirmative defense – that the presence of the prohibited substance in his urine was not due to his fault or negligence, because he took appropriate steps to investigate the contents of the substance he ingested. (*Id.* ¶ 5.2.)

The hearing before the Arbitrator took place on October 4, 2016. (Compl. ¶ 165.) Six days later, the Arbitrator issued a summary decision denying Johnson's appeal. (*Id.* ¶ 66.) The next day, the Arbitrator issued a twelve-page written opinion setting forth the justification for his decision.

D. The October 11, 2016 Arbitral Award

In the Arbitral Award, the Arbitrator first determined that the effective date of

Johnson being "placed into" the reasonable-cause testing program for purposes of Section 3.1 of the Policy was August 18, 2014 – the date on which his name was removed from the general random testing pool and reasonable-cause testing was initiated. (Award ¶ 6.14.) The Arbitrator thus concluded that the July 12, 2016 test occurred while Johnson was properly in the reasonable-cause testing program and was therefore authorized under the Policy. (*Id.* ¶ 6.20.)

Next, the Arbitrator determined that none of the collection and analysis issues raised by Johnson supported an appeal of the sanction. (*Id.* ¶ 6.42.) The Arbitrator found that the positive result of the "B" sample was validly certified by Dr. Butch, based on the agreement between the bargaining parties to permit the director of the testing laboratory to certify test results. (*Id.* ¶¶ 6.26–6.27.) The Arbitrator also found no deviation from the Policy with respect to the destruction of specimens (*id.* ¶ 6.30); deemed Johnson's claims regarding improper testing personnel to be untimely, abandoned, and unpersuasive (*id.* ¶ 6.35); and determined that Dr. Levine was not hampered in his efforts to perform an effective observation of the B sample analysis (*id.* ¶ 6.36–6.41).

Finally, the Arbitrator turned to Johnson's affirmative defense – that the presence of the prohibited substance was not due to Johnson's fault or negligence. (*Id.* ¶ 6.43–6.59.) After taking note of the warnings given by the NFL and NFLPA to players regarding the use of supplements and describing Johnson's decision-making process in deciding to ingest the supplement at issue – which included receiving assurances from friends and consulting a website which stated that the substance was "OKAY" to consume (*id.* ¶¶ 6.45–6.58) – the Arbitrator determined that Johnson's conduct was negligent and rejected his affirmative defense (*id.* ¶ 6.59).

E. Procedural History

Johnson commenced this case on January 6, 2017 in the United States District Court for the Northern District of Ohio, naming the NFLPA, the NFL, and the NFLMC as defendants. (Doc. No. 1.) In addition to petitioning the court to vacate the arbitration award, Johnson also alleged that the NFLMC breached the 2015 Policy in violation of Section 301 of the Labor Management Relations Act ("LMRA"), that the NFLPA breached the duty of fair representation that is implied from the National Labor Relations Act ("NLRA"), and that the NFLPA violated the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") when it failed to turn over the documents requested by Johnson. (Compl. ¶¶ 265–276, 278–303, 305–315, 317–332.) The case was assigned to Judge Sara Lioi in Akron, Ohio.

On January 19, 2017, the NFLPA moved to transfer venue to the Southern District of New York (Doc. No. 16) and to stay the proceedings pending resolution of that motion (Doc. No. 17). The NFL and NFLMC joined the motion to stay the proceedings (Doc. No. 21), and filed their own joint motion in which they urged Judge Lioi to dismiss the petition for lack of personal jurisdiction or improper venue, or in the alternative, to transfer venue (Doc. No. 22). On July 6, 2017, after what Judge Lioi referred to as an "unwieldy" influx of filings that included a First Amended Complaint (Doc. No. 39) by Johnson and a motion to dismiss filed by the NFLPA (Doc. No. 26), Judge Lioi granted Defendants' motion to transfer venue to the Southern

District of New York without ruling on any of the other pending motions (Doc. No. 68).

On July 18, 2017, the case was assigned to my docket. On August 1, 2017, the Court denied each of the pending motions without prejudice to renewal. (Doc. No. 86.) At an initial conference on August 24, 2017, the Court set a briefing schedule for the parties to file renewed motions based on relevant Second Circuit authorities. On September 25, 2017, Johnson filed his petition to vacate the arbitration award and the NFLPA filed its motion to dismiss (Doc. Nos. 107, 108), which were fully briefed on November 8, 2017 (Doc. Nos. 117, 118, 119).

II. NFLPA's Motion to Dismiss

A. Standing

As an initial matter, the NFLPA moves to dismiss Johnson's claims for lack of standing under Rule 12(b)(1). To withstand a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the party seeking to invoke the Court's jurisdiction bears the burden of proving that subject matter jurisdiction exists. *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

To establish Article III standing, the plaintiff bears the burden of demonstrating (1) an "injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.* at 1548 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

To show injury in fact, the plaintiff must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). "[G]eneral factual allegations of injury resulting from Defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 560 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 US. 871, 889 (1990)). "The 'causal connection' element of Article III standing, i.e., the requirement that the plaintiff's injury be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court,' does not create an onerous standard" and "is a standard lower than that of proximate causation." *Carter v. HealthPort Techs.*, 822 F.3d 47, 55 (2d Cir. 2016) (quoting *Lujan*, 504 U.S. at 560). "A defendant's conduct that injures a plaintiff but does so only indirectly, after intervening conduct by another person, may [still] suffice for Article III standing." *Id.* at 55–56.

The NFLPA contends that Johnson lacks standing to allege a breach of the duty of fair representation because (1) the Arbitrator concluded that the misconduct alleged by Johnson did not materially affect Johnson's positive test result, and (2) Johnson admitted to ingesting the substance in question, i.e., that his injuries were not fairly traceable to the NFLPA. However, the NFLPA's argument improperly grafts onto the standing inquiry the demanding standard for causation in a duty of fair representation

claim. At the standing stage, Johnson is not required to show that the NFLPA's conduct seriously undermined or even altered the outcome of his arbitral process; rather, he must merely allege facts demonstrating that he was injured by conduct attributable to the NFLPA. In that regard, Johnson pleads numerous injuries traceable to the NFLPA, including the costs of retaining outside counsel to pursue his appeal rights due to the NFLPA's lack of support, reputational harm stemming from the NFLPA's media statements, and the detrimental impact of the NFLPA's silence in his arbitration hearing, all of which satisfy the permissive standard for causation under Article III standing. (Doc. No. 112 at 8–10.) Under the NFLPA's circular theory, federal courts would have standing to hear only *meritorious* claims – an untenable position that improperly conflates the standing and merits analyses. *See, e.g.*, *Bordell v. Gen. Elec. Co.*, 922 F.2d 1057, 1060 (2d Cir. 1991); *Montgomery v. Cuomo*, 291 F. Supp. 3d 303, 343 (W.D.N.Y. 2018).

Johnson likewise has alleged sufficient facts to establish standing for his LMRDA claim, which alleges that the NFLPA failed to provide, upon request, a copy of purported modifications of the 2015 Policy, in violation of Section 104 of the LMRDA. (Compl. ¶ 306–315.) "[A] plaintiff suffers a sufficiently concrete injury to confer Article III standing when she is denied access to information that, in the plaintiff's view, must be disclosed pursuant to a statute and when there is 'no reason to doubt' that the information would help the plaintiff within the meaning of the statute." *McFarlane v. First Unum Life. Ins. Co.*, 274 F. Supp. 3d 150, 161 (S.D.N.Y. 2017) (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998)). Here, there is no reason to doubt that had the NFLPA fulfilled its LMRDA duty to provide Johnson with a full copy of the operative collective bargaining agreement, Johnson's ability to understand his rights under the collective bargaining agreement would have been "helped." Again, the NFLPA's assertion that Johnson lacks standing to assert his LRMDA claim because he has not shown that the alleged LMRDA violations altered the outcome of the arbitration applies the wrong causation standard to the standing analysis.

The NFLPA further asserts that Johnson lacks standing to assert his Declaratory Injunction Act claim under 28 U.S.C. § 2201 because he has alleged only past injury. (Doc. No. 109 at 12–13.) However, the NFLPA fails to acknowledge the cumulative nature of penalties under the 2015 Policy and its predecessor and successor policies (*see* Compl. ¶ 342), as well as the ongoing injuries stemming from Johnson's continued participation in the reasonable-cause program (Doc. No. 112 at 13). In light of these alleged ongoing injuries, Johnson has standing to make his Declaratory Injunction Act claim.

Because the Court finds that Johnson has standing to assert his various causes of action, the Court proceeds to the merits of Johnson's claims.

B. Failure to State a Claim

To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must "provide the grounds upon which [the] claim rests." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007); *see also* Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."). To meet this standard, plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A

claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In reviewing a Rule 12(b)(6) motion to dismiss, a court must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *ATSI Commc'ns*, 493 F.3d at 98. However, that tenet "is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. Thus, a pleading that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. If the plaintiff "ha[s] not nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed." *Id.* at 570.

The NFLPA moves to dismiss Johnson's claims that the NFLPA breached its duty of fair representation and that the NFLPA violated the LMRDA. The Court will address each in turn.

1. Duty of Fair Representation

Johnson brings claims against the NFLMC and NFLPA through what is known as a "hybrid § 301/fair representation claim." *Carrion v. Enter. Ass'n, Metal Trades Branch Local Union 638*, 227 F.3d 29, 33 (2d Cir. 2000). Such claims combine two causes of action: the suit against the employer alleges breach of the collective bargaining agreement and arises under Section 301 of the LMRA,[2] while the "suit against the union is for the breach of the union's duty of fair representation," a duty implied under the NLRA. *Roy v. Buffalo Philharmonic Orchestra Soc'y, Inc.*, 682 F. App'x 42, 44 (2d Cir. 2017). Significantly, "a union's breach of the duty of fair representation is a prerequisite to consideration of the merits of [a] plaintiff's claim against an employer for breach" of a collective bargaining agreement. *Acosta v. Potter*, 410 F. Supp. 2d 298, 309 (S.D.N.Y. 2006) (internal quotation marks and citation omitted).

Unions have a duty to "represent fairly all employees subject to the collective bargaining agreement," *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 709 (2d Cir. 2010) (citation omitted), a duty that extends to "all union activity," *Air Line Pilots Ass'n, Int'l. v. O'Neill*, 499 U.S. 65, 67 (1991). This duty is "implied from § 9(a) of the National Labor Relations Act," *White v. White Rose Food*, 237 F.3d 174, 179 n.3 (2d Cir. 2001), and "marks the outer boundary of a union's broad discretion to represent members of a bargaining unit," *Acosta*, 410 F. Supp. 2d at 308.

"To prove that a union has breached its duty of fair representation," a plaintiff "must establish two elements. *First*, [he] must prove that the union's actions or inactions are either 'arbitrary, discriminatory, or in bad faith.' *Second*, [he] must demonstrate a causal connection between the union's wrongful conduct and [his] injuries." *Vaughn*, 604 F.3d at 709–10 (first quoting *O'Neill*, 499 U.S. at 67, then quoting *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998)). In the arbitration context, the standard for causation is a demanding one: "a cause of action for breach of the duty of fair representation only lies where the union's action 'seriously undermine[d] the arbitral

[2] Section 301 of the LMRA provides that federal district courts may hear suits based upon the breach of a contract between an employer and a labor organization. *See* Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a).

process.'" *Nieves v. District Council 37 (DC 37), AFSCME, AFL-CIO*, No. 04-cv-8181 (RJS), 2009 WL 4281454, at *10 (S.D.N.Y. Nov. 24, 2009) (quoting *Barr v. United Parcel Serv.*, 868 F.2d 36, 43 (2d Cir. 1989)), *aff'd sub nom. Nieves v. Roberts*, 420 F. App'x 118 (2d Cir. 2011).

The Supreme Court has elaborated upon each of the categories of wrongful conduct that may constitute a breach of the duty of fair representation. The Court has explained that union actions qualify as arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 499 U.S. at 67 (internal quotation marks and citation omitted). A union's actions are discriminatory if "substantial evidence" indicates that discriminatory conduct was "intentional, severe, and unrelated to legitimate union objectives." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 301 (1971); *see also Vaughn*, 604 F.3d at 709. Finally, bad faith includes "fraud, dishonesty, and other intentionally misleading conduct," and requires that the plaintiff prove the union acted with "an improper intent, purpose, or motive." *Spellacy*, 156 F.3d at 126.

A district court's review of union conduct for alleged breaches of the duty of fair representation is "highly deferential, recognizing the wide latitude that [unions] need for the effective performance of their bargaining responsibilities." *O'Neill*, 499 U.S. at 78. The Second Circuit has further explained that "[t]actical errors are insufficient to show a breach of the duty of fair representation; even negligence on the union's part does not give rise to a breach." *Vaughn*, 604 F.3d at 709 (citation omitted).

Here, Johnson alleges that the NFLPA breached its duty of fair representation in four ways. First, he asserts that the NFLPA violated its constitution by permitting unratified deviations from the 2015 Policy. (Doc. No. 112 at 16.) Second, he alleges that the NFLPA failed to investigate Johnson's discipline and was generally unsupportive of him throughout the arbitration. (*Id.* at 18.) Third, he contends that the NFLPA refused to provide him with documents to which he was entitled. (*Id.* at 19.) And fourth, Johnson alleges that the NFLPA colluded with the NFLMC and retaliated against him for his critical comments in the media. (*Id.* at 21.) Because Johnson has not plausibly alleged that any of this conduct was both "arbitrary, discriminatory, or in bad faith" *and* that it "seriously undermined" the arbitral process, his claim for a breach of the duty of fair representation cannot stand. *Barr*, 868 F.2d at 43.

a. Unratified Deviations from the Policy

Johnson alleges a panoply of "unratified deviations" from the Policy, but none constitutes a breach of the duty of fair representation. As an initial matter, Johnson attempts to attribute arbitrariness and bad faith to these deviations by framing them as violations of the NFLPA's own internal constitution, since none of them was ratified by the NFLPA's membership. However, while Section 6.05 of the NFLPA's internal constitution does provide that ratification is required in order to "amend a Collective Bargaining Agreement during the period of its agreed duration," the same section preserves the NFLPA's right to "enter into side letters and/or other documents, including the resolution of grievances, which clarify or interpret the provisions of any existing Collective Bargaining Agreement or are necessary to the orderly

implementation and administration of a Collective Bargaining Agreement." (Doc. No. 116, Ex. 22 § 6.05.)

Each of the deviations alleged by Johnson plausibly falls within the realm of being "necessary to the orderly implementation and administration" of the Policy, given that, at the time of Johnson's arbitration, the NFLPA and NFLMC were engaged in an ongoing process of implementing the newly agreed-upon policy.

For example, the first deviation to which Johnson points is the side agreement between the NFLPA and the NFLMC permitting directors of the UCLA Olympic Analytical Laboratory and the Sports Medicine Research and Testing Laboratory to fulfill the certification responsibilities of the Chief Forensic Toxicologist. (Compl. ¶¶ 95–99, 120.) But far from "seriously undermining" the arbitral process, this "deviation" in fact was intended to *facilitate* the arbitration. Dr. Finkle, the designated Chief Forensic Toxicologist in the 2015 Policy, retired from the position in 2015. (*See* Compl. ¶ 97.) Rather than suspend all arbitrations or subject Johnson to an excessive delay, the NFLPA and NFLMC agreed to a substitute forensic toxicologist who was acceptable to all parties as an interim measure until a new, permanent Chief Forensic Toxicologist could be appointed. (Doc. No. 59, Ex. 9.) As a result, this accommodation was necessary to the orderly implementation of the policy, and in no way undermined the arbitral process.

The next "deviation" with which Johnson takes issue is the agreement between the NFLPA and the NFLMC regarding the interpretation of Policy Section 3.1, which dictates the permissible duration of a player's placement in the reasonable-cause testing program. (Compl. ¶¶ 69–81, 121.) Here, too, Johnson is unable to demonstrate a breach of the duty of fair representation. Johnson has not pleaded any facts to suggest that the agreed-upon timeline for the two-year reasonable-cause testing period was "discriminatory," since all players, not just Johnson, were equally subject to the NFLPA and NFLMC's interpretation of this section of the Policy. Likewise, Johnson has not alleged facts suggesting any fraud, dishonesty, or misleading conduct that would permit an inference of bad faith. Nor has Johnson established that the parties' interpretation of Section 3.1 was "arbitrary."

Section 3.1 of the Policy, which to be sure is not a model of clear draftsmanship, states:

> Players who are placed into the reasonable cause program based on a violation of the Policy must remain in the program a minimum of two years or two full seasons, whichever is shorter, after which the Independent Administrator must either discharge the Player or notify him in writing that he will remain in the program subject to review at a later date.

Johnson maintains that he was not properly in the reasonable-cause testing program at the time of the July 12, 2016 test because the "two years or two full seasons" mark had elapsed without a properly-timed notification that he would remain in the program. He thus casts the NFLPA's refusal to advance this argument as "[r]edefining the period of time a player can be kept in the reasonable cause testing program," thus constituting a "substantive and material deviation from the terms of the 2015 Policy." (Compl. ¶ 121.)

However, as the Arbitrator pointed out, the NFLPA and NFLMC interpreted the language "placed into the reasonable cause program" as referring to the moment when a player's name is actually removed from the general random testing pool and his reasonable-cause testing is initiated. (Award ¶ 6.12–6.15.) Under that interpretation, the timing of Johnson's test was proper. Johnson has not set forth facts establishing why this interpretation of the Policy is arbitrary, let alone "so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 499 U.S. at 67 (internal quotation marks and citation omitted). In the absence of plausible claims of arbitrary, discriminatory, or bad faith conduct, Johnson's claim fails.

Johnson next challenges the NFLPA's failure to insist on compliance with the provisions relating to arbitrator selection, including the establishment of a pool of three arbitrators, the designation of a Notice Arbitrator responsible for the scheduling and assignment of appeals, the requirement that arbitrators have no connection to the NFL, and the approval of a set of testing collection procedures. (Compl. ¶¶ 115–119.) Here, too, Johnson is unable to demonstrate a breach of the duty of fair representation.

For example, the fact that Johnson's arbitrator was drawn from a pool of two arbitrators, rather than the three required by the Policy, was neither discriminatory – since all players were equally affected by the composition of the arbitrator pool – nor arbitrary. True, the NFLPA and the NFLMC were jointly tasked with choosing "no fewer than three but no more than five arbitrators" to hear certain appeals under the 2015 Policy. (Policy § 9.) But it took them six months to choose the first arbitrator, three more months to agree upon a second, and eighteen months more to select a third. (*See* Doc. No. 113 at 3–6.) Johnson filed his timely appeal of the NFLMC's disciplinary decision during the period between the selection of the second and third arbitrators. (*See* Compl. ¶ 57.) Johnson's allegation that the NFLPA permitted a deviation from the three-arbitrator requirement in his case amounts to a claim that the NFLPA's timeline for filling the positions was arbitrary. While from Johnson's perspective it may have been preferable or even wise for the NFLPA and the NFLMC to choose three arbitrators more quickly – or at least prior to the arbitration of any disciplinary appeals – their decision to do so in stages was not irrational. Again, the NFLPA retains "wide latitude" in its role representing employees, and nothing in Johnson's allegations pushes the NFLPA's timeline for appointing arbitrators into the realm of the arbitrary. As to the fact that (1) the Notice Arbitrator was appointed by the NFLPA and the NFLMC rather than by the arbitrators, and (2) the NFLPA and NFLMC, rather than the Notice Arbitrator, scheduled and assigned arbitrators to appeals (Doc. No. 116 at 4), Johnson cannot plausibly claim that these alleged deviations undermined his arbitral process, since he does not plead any facts to suggest that his arbitration was affected in any way by the manner in which it was scheduled or the method of choosing the Notice Arbitrator.

With respect to the NFLPA's choice of James Carter to serve as the Arbitrator, Johnson once again cannot establish arbitrary, discriminatory, or bad faith conduct. Johnson objects that at the time of Johnson's arbitration, Carter had also been approved to serve as an arbitrator under a separate NFLMC-NFLPA policy, and was employed by a law firm, WilmerHale, which represented the NFL in other capacities. (*See* Compl. ¶¶ 175–190.) As with the other

deviations to which Johnson points, the selection of Carter as one of the pool arbitrators affected all players equally, ruling out the possibility of discrimination, and Johnson does not allege facts that plausibly support a finding that the NFLPA's decision to waive these alleged conflicts amounted to bad faith. As for arbitrariness, in light of the minimal nature of the Arbitrator's conflicts as well as the fact that Carter was eminently well-qualified, Johnson cannot establish that the NFLPA's choice of Arbitrator Carter was "so far outside a wide range of reasonableness as to be irrational." *O'Neill*, 499 U.S. at 67 (internal quotation marks and citation omitted).

The final deviation identified by Johnson is the NFLPA's failure to create or approve "procedures for the handling of NFL Player specimens following laboratory analysis" to "ensure the destruction of negative specimens within 90 days of analysis and positive specimens within 30 days of final adjudication of a Player's discipline." (Compl. ¶ 135; Policy § 16.) But once again, it cannot be argued that the alleged failure to create or approve these procedures prior to Johnson's arbitration had the effect of "seriously undermin[ing]" the arbitral process. The Arbitrator specifically found that any such deviation would not have "materially affected the accuracy or reliability of the test result" (Award ¶ 6.30), and Johnson has pleaded no facts to suggest that the failure to promulgate such procedures impacted the outcome of his arbitration in any way, let alone "seriously undermined" the process.

Thus, because Johnson has not pleaded sufficient facts to plausibly suggest that any of the NFLPA's alleged deviations from the Policy constituted arbitrary, discriminatory, or bad faith conduct that seriously undermined the arbitral process, he has failed to make out a violation of the duty of fair representation.

b. Failure to Investigate and Support

Johnson's second basis for claiming a breach of the duty of fair representation – the NFLPA's failure to investigate Johnson's discipline and its general unsupportiveness during his arbitration – fares no better than the first, since Johnson cannot establish that this alleged conduct by the NFLPA "seriously undermined" the arbitral process. As an initial matter, Johnson's efforts to establish causation between the NFLPA's conduct and the arbitral outcome are made more difficult by the unusual nature of his hybrid claim. Significantly, Johnson's claim differs from typical hybrid LMRA/NLRA actions in that the NFLPA did not retain sole authority to pursue employee grievances. *Cf. Vaca v. Sipes*, 386 U.S. 171, 185 (1967) (creating the hybrid LMRA/NLRA action where "the union has *sole* power under the contract to invoke the higher stages of the grievance procedure, and . . . the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance" (emphasis added)). While establishing causation is relatively straightforward in a case where the union reserved the *exclusive* right to pursue grievances, an employee faces a higher burden where, as here, the employee was able to pursue his claim directly, rather than relying wholly upon the union. *See, e.g.*, *Spellacy*, 156 F.3d at 129 (finding no violation of the duty of fair representation despite alleged misrepresentations by the union where employees "knew [the union's] position in time to challenge its decision" and "hired attorneys to file grievances"). Johnson is unable to meet that burden here.

As to Johnson's vague allegation that the NFLPA "failed to investigate" his claims (Doc. No. 109 at 18–19), he cannot plausibly suggest that this failure "seriously undermined" his arbitration when he had his own team of three attorneys pursue an investigation on his behalf. Likewise, the fact that the NFLPA did not advance Johnson's argument regarding the timeliness of his reasonable-cause test fails for lack of causation. While a union may not "arbitrarily ignore a meritorious grievance or process it in perfunctory fashion," *Spellacy*, 156 F.3d at 128 (quoting *Vaca*, 386 U.S. at 191), the NFLPA's failure to pursue the two-year limitations argument could not have "seriously undermined" the arbitral process because the Arbitrator did not rely on the NFLPA's silence in coming to his conclusions. Rather, he drew on the text of the policy itself (Award ¶¶ 6.12, 6.19 (interpreting "placed into the reasonable cause testing program")), Johnson's own understanding of the reasonable-cause testing program (*id.* ¶ 6.16), and the Independent Administrator's understanding of the program (*id.* ¶¶ 6.13, 6.19). In light of these other sources of evidence, the NFLPA's silence on the subject cannot have seriously undermined the fairness of Johnson's arbitration.

Johnson's claim that the NFLPA was generally unsupportive during his arbitration is similarly untenable. Just like the Arbitrator's reasoning regarding the timeliness of Johnson's reasonable-cause test, the Arbitrator's reasoning throughout the rest of the Award also drew on sources unconnected to the NFLPA to conclude that Johnson's appeal was unjustified. In evaluating the prima facie case for the validity of the test, the Arbitrator repeatedly found that any deviations "did not materially affect the accuracy or reliability of the test result." (*Id.* ¶¶ 6.27 (certification by someone other than the Chief Forensic toxicologist did not materially affect the test result), 6.30 (purported deviations as to destruction of specimens would not have materially affected the test result if they took place), 6.35 (there was "no evidence" that purported deviations from the Policy as to testing personnel would have materially affected the test result), 6.41 (testimony as to laboratory protocols did not rebut the prima facie case for a valid test).) And in considering Johnson's affirmative defense – that the presence of the prohibited substance leading to the test result "was not due to his fault or negligence" – the Arbitrator found Johnson's own admissions dispositive. (*Id.* ¶ 6.59.)

Given the weight the Arbitrator placed on considerations that could not have been affected even by enthusiastic representation by the NFLPA, and given that Johnson, unlike most employees bringing such claims, vigorously pursued his *own* appeal, Johnson has failed to allege facts establishing that the NFLPA's conduct could have "seriously undermined the arbitral process." Thus, even assuming that the union acted arbitrarily, discriminatorily, or in bad faith by not investigating or being "generally unsupportive," this claim must fail as a matter of law.

c. Failure to Provide Documents

Johnson next alleges that the NFLPA's refusal to provide him with copies of (1) the side agreements between the NFLPA and the NFLMC, (2) documents regarding Johnson's testing history, and (3) documentation of lab protocols denied him the fair representation to which he was entitled. This claim necessarily fails on the causation prong. Although Johnson argues that the documents in question were "germane" to the Arbitrator's decision (Doc.

No. 112 at 21), and it is true that the Arbitrator directly referenced the side agreement authorizing an interim replacement for the Chief Forensic Toxicologist in his Award (Award ¶ 6.27), Johnson nevertheless fails to draw any causal link between the NFLPA's failure to provide him with these documents and the arbitral outcome.

As discussed above, the NFLPA was entitled under its constitution to enter into side agreements to facilitate the implementation and administration of the Policy. Because Johnson offers no explanation for why the Arbitrator's ruling could have been affected had Johnson been provided with a copy of the side letters, Johnson cannot satisfy the demanding burden of demonstrating that the NFLPA's failure to do so "seriously undermined" the arbitral process.

This causal link is similarly absent as to the NFLPA's alleged failure to provide documentation of Johnson's testing history. Given that Johnson made a robust and detailed argument about the timeline of his testing, which was ultimately found unpersuasive by the Arbitrator based on the wealth of reasoning described above, Johnson has not plausibly alleged that any failure to provide further documentation of his testing timeline affected the arbitral outcome.

As for the laboratory protocols, the Arbitrator's finding that a "toxicological observer is not authorized to audit all of the testing laboratory's procedures, and [that] discovery of documents requested for such a purpose [is] not permitted by the Policy" forecloses the possibility that the arbitral process was "seriously undermined" by the refusal to provide those documents. (Award ¶ 6.40; *see also id.* ¶ 6.39 ("During 26 years of operations under the present Policy and its predecessors, there is no known case in which an observing toxicologist was provided with documents other than the standard documentation package provided for in the Policy.").)

d. Collusion and Retaliation

Johnson's final argument, that the NFLPA breached its duty of fair representation by colluding with the NFLMC and retaliating against Johnson, is equally unavailing. To support this claim, Johnson states that he publicly complained about the inadequacy of the union's representation, which was then reported in the media. (Compl. ¶¶ 123–124.) Taking exception to Johnson's media statement, the NLFPA – according to Johnson – falsely stated that the union had been in touch with Johnson and his agent to clarify the facts. (*Id.* ¶¶ 125–126.) Following Johnson's appeal, the NFLMC noted in an email to NFLPA attorneys that Johnson was "less than thrilled with the NFLPA" and proposed that the NFLMC and NFLPA discuss his appeal. (*Id.* ¶ 129.) Johnson also conclusorily asserts that NFLPA representatives Heather McPhee and Todd Flanagan colluded with Kevin Manara of the NFLMC. (*Id.* ¶ 217–218).

But the misconduct alleged by Johnson simply restates the "conduct that the Court has concluded is otherwise lawful, followed by an entirely conclusory accusation of conspiracy and bad faith." *Bejjani*, 2013 WL 3237845, at *14. The law is clear that such threadbare attempts to "infus[e] . . . otherwise-lawful actions with bad faith" through allegations of collusion or retaliation are not sufficient to state a claim for the breach of the duty of fair representation. *Id.* at 16.

Where a plaintiff fails "to allege familiar aspects of a conspiracy, such as who was involved, and when and where these individuals met and conspired," the plaintiff fails to clear the *Twombly* threshold for surviving a motion to dismiss. *Id.*; *see also, e.g.*, *Peoples v. Fischer*, No. 11-cv-2694 (SAS), 2011 WL 6034374, at *3 (S.D.N.Y. Dec. 1, 2011) ("[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed." (citation omitted)).

Here, Johnson at most identifies the "who" of his alleged conspiracy, with perhaps a sliver of a "why." However, the complaint ultimately suffers from a dearth of concrete facts and therefore "stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (quotation marks omitted). Aside from naming the individuals Johnson believes engaged in collusion, Johnson merely repeats the allegations of conduct that did not amount to violations of the duty of fair representation for the reasons explained above. "In the absence of subsidiary allegations fleshing out an agreement to retaliate" against Johnson, "the bare and conclusory allegation" that the NFLPA "manifested bad faith by conspiring with" the NFLMC "does not rise above *Twombly*'s plausibility threshold." *Bejjani*, 2013 WL 3237845, at *15.

* * *

Because Johnson cannot, as a matter of law, establish that the NFLPA engaged in arbitrary, discriminatory, or bad faith conduct that seriously undermined the arbitral process, he has failed to establish that the NFLPA breached its duty of fair representation. Accordingly, the NFLPA's motion to dismiss is GRANTED as to Johnson's duty of fair representation claims (Counts Eight and Ten), as well as Johnson's claim for declaratory relief (Count Eleven).

2. LMRDA

Johnson also brings a claim under Section 104 of the LMRDA, alleging that the NFLPA violated this provision by refusing to provide, upon request, a copy of the full operative collective bargaining agreement. Section 104 of the LMRDA provides that a union must "forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement." 29 U.S.C. § 414. Johnson alleges that the NFLPA refused to provide Johnson with all side agreements that modified the 2015 Policy, despite his requests for those documents. (Compl. ¶ 310.)

The NFLPA seeks dismissal of Johnson's claim, arguing that it was under no obligation to immediately provide the side agreements, that Johnson had sufficient access to the operative version of the agreement, and that his rights were not "directly affected" by the side agreements. (Doc. No. 109 at 23–24.) These arguments are unpersuasive. First, the NFLPA's assertion that the LMRDA does not require the NFLPA to "make an instant mailing to its 2,000 members" every time the NFLPA and NFL reach some agreement (Doc. No. 112 at 23) misses the mark. Far from seeking an "instant mailing" to all members – an action not contemplated in the LMRDA, which requires the provision of documents only "on request" – Johnson simply asserts that the NFLPA refused to

comply with its statutory duty to accommodate his *specific request* for the documents in question.

Moreover, the NFLPA's assertion that the side agreements are not an operative part of the Policy is similarly unconvincing. Though the Court determined above that the modifications of the policy were not required to be ratified under the NFLPA's internal constitution, these modifications nevertheless affected the functioning of the Policy and were therefore "operative" components of that Policy. The NFLPA's citation to *Summerville v. Local 77*, 369 F. Supp. 2d 648 (M.D.N.C.), *aff'd*, 142 F. App'x 762 (4th Cir. 2015), is therefore inapposite. There, unlike here, plaintiffs sought a copy of future, rather than presently operative, modifications. *See id.* at 658–59.

Along the same lines, the NFLPA's assertion that the side agreements do not "directly affect" Johnson's rights falls flat. The LMRDA's requirement that an agreement "directly affects" the rights of an employee encompasses, on its face, even agreements that merely interpret existing provisions of a collective bargaining agreement. Because the NFLPA altered the contours of its relationship with its members via the side agreements in question, Johnson's rights were directly affected by them, and Johnson was entitled to copies.

Finally, because Johnson has still not received a copy of the full operative Policy, the NFLPA's citations to *Gonzalez v. Local 32BJ, SEIU*, No. 09-cv-8464 (SHS) (RLE), 2010 WL 3785436 (S.D.N.Y. Sept. 7, 2010) and *Mazza v. Dist. Council of N.Y.*, No. cv-00-6854 (BMC) (CLP), 2007 WL 2668116 (E.D.N.Y. Sept. 6, 2007) are misplaced. (Doc. No. 109 at 23 n.15.) In those cases, the plaintiffs ultimately received a copy of the collective bargaining agreement, thereby mooting their LMRDA claims. While courts have treated claims under Section 104 of the LMRDA as moot once the plaintiff has received a copy of the full collective bargaining agreement – even if that receipt occurred during the course of litigation – Johnson maintains that he has still not received a copy of all side agreements. (Compl. ¶ 313.) Indeed, although the NFLPA attached the side agreement relating to the role of the Chief Forensic Toxicologist to its memorandum of law in opposition to Johnson's motion to vacate the arbitral award (Doc. No. 113, Ex. 9), the NFLPA has still not produced a copy of the side agreement relating to the bargaining parties' interpretation of the timeline for reasonable-cause testing. Johnson's claim is therefore not moot.

The Court thus finds that Johnson has stated a plausible claim for relief based on a violation of the LMRDA.[3] Accordingly, the NFLPA's motion to dismiss is DENIED as to Count 9, Johnson's LMRDA claim.

III. JOHNSON'S PETITION TO VACATE THE ARBITRAL AWARD

Having resolved the NFLPA's motion to dismiss Johnson's claims against the NFLPA for breach of the duty of fair representation and violations of the LMRDA, the Court now turns to Johnson's petition to vacate the Arbitral Award.

"A federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential – indeed, among the most deferential in the law." *Nat'l Football*

[3] Of course, given that claims under Section 104 of the LMRDA are mooted when the plaintiff receives a copy of the agreement in question, *see, e.g.*, *Gonzalez*, 2010 WL 3785436 at *4, the only relief to which Johnson would be entitled is a copy of the agreement and side letters in question.

League Mgmt. Council v. Nat'l Football League Players Ass'n (Brady), 820 F.3d 527,532 (2d Cir. 2016). A court's role "is not to determine for [itself]" the merits of the underlying dispute or to "second-guess the arbitrator's procedural rulings." *Id.* Rather, a court's "obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards" established by the LMRA. *Id.* Accordingly, courts "must simply ensure that the arbitrator was 'even arguably construing or applying the contract and acting within the scope of his authority' and did not 'ignore the plain language of the contract.'" *Id.* (quoting *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). This inquiry "does not require perfection in arbitration awards," but rather "dictate[s] that even if an arbitrator makes mistakes of fact or law, [a court] may not disturb an award so long as he acted within the bounds of his bargained-for authority." *Id.* Thus, if an arbitral award "draws its essence from the collective bargaining agreement and is not merely an exercise of the arbitrator's own brand of industrial justice," the award must stand. *Int'l Bhd. of Elec. Workers v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 714 (2d Cir. 1998) (quotations omitted). In light of this "substantial deference," only "exceptional" cases warrant vacatur. *Brady*, 820 F.3d at 532.

Although it could be argued that a union's breach of its duty of fair representation would justify a less deferential standard of review for an arbitral award – perhaps even warranting *per se* vacatur – no court has addressed that issue. In any event, the Court need not reach that question because, as determined above, Johnson has failed to state such a claim. Accordingly, Johnson's petition is subject only to the highly limited and deferential review described by the Second Circuit in *Brady*.

Johnson's petition sets forth numerous bases for vacating the Award, including (1) "manifest disregard" of the Policy, and a related argument for vacatur based on the Arbitrator exceeding his powers; (2) "evident partiality" based on the Arbitrator's alleged bias and failure to disclose his conflicts; (3) lack of fundamental fairness; and (4) a rehash of his allegations that the NFLPA and NFLMC breached the duty of fair representation and the collective bargaining agreement, respectively.

As a threshold matter, Johnson derives several of his stated grounds for vacatur from the Federal Arbitration Act ("FAA"). The Second Circuit has held that "[t]he FAA does not apply to arbitrations . . . conducted pursuant to the LMRA." *Brady*, 820 F.3d at 545 n.13. And while "the federal courts have often looked to the [FAA] for guidance in labor arbitration cases," *id.* (quoting *Misco*, 484 U.S. at 40 n.9), the Second Circuit has explicitly declined to hold that the FAA requirement of "fundamental fairness" and its "evident partiality" standard for vacatur apply in the LMRA context. *Id.*; *see also id.* at 518 n.16.

Indeed, "there are reasons for a court to be hesitant" when asked to incorporate FAA standards into the federal common law governing vacatur under the LMRA. *Nat'l Football League Mgm't Council v. Nat'l Football League Players Ass'n*, 296 F. Supp. 3d 614, 622 (S.D.N.Y. 2017). The "contextual differences" between arbitrations under the FAA and the LMRA warrant caution, as "courts should be more deferential to arbitrators in the context of labor disputes than other commercial disputes," since under the FAA "arbitration is the substitute for litigation," while under

the LMRA "it is the substitute for industrial strife." *Id.* (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960)).

But even if the FAA-based standards cited by Johnson are relevant, they can serve only to elucidate – rather than supplant – the *Brady* standard for vacatur under the LMRA in this Circuit. Under that demanding standard, Johnson cannot make the necessary showing to warrant vacatur of the arbitral award.

1. Manifest Disregard

Borrowing language from the FAA context, Johnson first argues that the arbitral award must be vacated because the Arbitrator was in "manifest disregard" of the Policy. (Doc. No. 110 at 12.) Johnson again points to the arbitrator selection process, the failure to apply the Policy's burden-shifting scheme, and the Arbitrator's reliance on information that was not provided to Johnson as sufficient departures from the Policy to warrant vacatur. But even assuming the FAA standard applies, "awards are vacated on grounds of manifest disregard only in 'those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is present.'" *Sutherland Glob. Servs. v. Adam Techs.*, 639 F. App'x 697, 699 (2d Cir. 2016) (quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010)). Under *Brady*, as long as the Arbitrator was "arguably construing or applying the contract and acting within the scope of his authority," the arbitral award must remain intact. *Brady*, 820 F.3d at 532.

As to Johnson's claims of "improper cherry picking" in arbitrator selection (Doc. No. 110 at 13), his claims rise and fall with his duty of fair representation claim. Here, the Policy allocated the choice of arbitrator to the bargaining parties – namely, the NFLPA and the NFLMC – and not to Johnson individually. Since the parties authorized Arbitrator Carter to preside over the proceeding, it can hardly be argued that the arbitrator selection process constituted "manifest disregard" of the Policy. Given the Court's finding that the NFLPA did not violate its duty of fair representation, the finality of the arbitral award must not be disturbed on this basis.

Johnson's claim that the Arbitrator improperly applied the Policy's burden of proof likewise fails. Asking this Court to vacate the arbitral award due to perceived flaws in the Arbitrator's analysis of the burden of proof amounts to an attempted relitigation of the merits of Johnson's claim – an exercise explicitly foreclosed by the Supreme Court. *See United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.")

Similarly, Johnson's argument that vacatur is warranted because the Arbitrator relied on information never provided to Johnson amounts to a request for this Court to substitute its own procedural ruling for that of the Arbitrator. Once again, "[i]t is well settled that procedural questions that arise during arbitration, such as which witnesses to hear and which evidence to receive or exclude, are left to the sound discretion of the arbitrator and should not be second-guessed by the courts." *Brady*, 820 F.3d at 545. Indeed, the Supreme Court has made clear that the highly deferential posture of a federal court reviewing an

arbitral award pursuant to the LMRA becomes still more deferential as to procedural questions. *See Misco*, 484 U.S. at 40 ("[W]hen the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator.") Because Johnson's argument would require the Court to override the arbitrator's evidentiary rulings with its own view of the merits, the Court declines to vacate the arbitral award on this basis.

Johnson thus fails to establish that the Award was so detached from the Policy, or undertaken in "manifest disregard" of the Policy, that vacatur is warranted.[4]

2. Evident Partiality

Johnson next seeks vacatur on the grounds of "evident partiality," another import from the FAA. (Doc. No. 110 at 15.) Under that standard, courts may vacate an arbitration award "where there was evident partiality . . . in the arbitrator[]." 9 U.S.C. § 10(a)(2). "Evident partiality may be found only 'where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'" *Scandinavian Reins. Co. Ltd. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 64 (2d Cir. 2012) (quoting *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007)). "The party seeking vacatur must prove evident partiality by 'clear and convincing evidence.'" *Brady*, 820 F.3d at 548 (quoting *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 106 (2d Cir. 2013)).

In alleging evident partiality, Johnson points to the Arbitrator's failure to disclose conflicts involving himself and his firm in other NFL-related matters and argues that his discovery rulings demonstrated bias that warrants vacatur of the arbitral award. But as noted above, the alleged conflicts were disclosed to – and waived by – the relevant parties to the collective bargaining agreement, the NFLPA and the NFLMC. Furthermore, Johnson's claims regarding the Arbitrator's discovery rulings once again require second-guessing the merits of the Arbitrator's procedural and evidentiary rulings – an exercise that is plainly off-limits under Second Circuit and Supreme Court precedent. But even considering those rulings on the merits, the Court cannot say that any of them reflects even the hint of bias against Johnson. Johnson has thus fallen far short of the evident partiality standard for vacatur, under which a reasonable person would "*have to*" conclude that an arbitrator was biased and that the award should not be afforded its usual presumption of finality. *Applied Indus. Materials Corp.*, 492 F.3d at 137 (emphasis added).

3. Fundamental Fairness

Johnson next points to the freestanding "fundamental fairness" standard for vacatur under the FAA. (Doc. No. 110 at 22.) Under that standard, an award may be vacated if "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy," 9 U.S.C. § 10(a)(3), that undermined the "fundamental fairness" of the proceeding. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997). However, the notion of fundamental fairness – which, as discussed above, may well have no place in a court's review of arbitral awards under the LMRA, *see NFL Mgm't Council*, 296 F.

[4] Johnson also claims that the Arbitrator "exceeded his powers throughout the arbitration." (Doc. 110 at 21.) Because this claim is premised on the same arguments that were considered and rejected above, those claims necessarily fail for the same reasons.

Supp. 3d at 623 – cannot bear the weight Johnson places upon it. Once again, Johnson merely repackages the same claims detailed above, which failed to warrant vacatur on their own, and hopes that reciting them again may somehow amount to a violation of "fundamental fairness." At bottom, Johnson challenges two aspects of his award: the arbitrator selection process and the procedural and substantive rulings made by the Arbitrator. The first category cannot constitute a violation of fundamental fairness where the NFLPA represented Johnson and, in its capacity as the relevant bargaining party, agreed to and was aware of all aspects of the selection procedure that Johnson now frames as unfair. Because Johnson failed to demonstrate that the NFLPA breached its duty of fair representation, he cannot now seek to revive those failed arguments under the guise of "fundamental fairness."

As to the second category, Johnson is unable to show that the Arbitrator's rulings were so far afield that the award failed to "draw[] its essence from the collective bargaining agreement," thus constituting the Arbitrator's "own brand of industrial justice." *Int'l Bhd. of Elec. Workers*, 143 F.3d at 714. Having reviewed the Arbitrator's decision, the Court perceives no independent violation of "fundamental fairness" that could require overturning the arbitral award.

4. Alleged Violations by the NFLPA and NFLMC

Johnson's final claim, that vacatur is necessitated by the NFLPA's breach of its duty of fair representation and the NFLMC's breach of the Policy (Doc. No. 110 at 22), has already been rejected. Because Johnson failed to state a claim for a breach of the duty of fair representation against the NFLPA, and is therefore unable to make any claims against the NFLMC for violation of the collective bargaining agreement, those claims cannot form a separate basis for vacatur of the Award. *See White*, 237 F.3d at 83; *Roy,* 682 F. App'x at 44.

Accordingly, Johnson's petition to vacate the arbitral award must be DENIED.

IV. Conclusion

Johnson is obviously dissatisfied with the Arbitrator's ruling and unhappy with the performance of his union. And like a Monday morning quarterback, he has scoured every inch of the record in search of imperfections, anomalies, and errors in judgment to justify overturning the result. However, the law is clear that arbitration awards are not to be lightly overturned, and that tactical errors, mistakes of fact or law, and even negligence are not enough to warrant vacatur. Perfection is not required. Here, Johnson has failed to allege any facts suggesting that the NFLPA breached its duty of fair representation to Johnson. Nor has he demonstrated that the Arbitrator's Award fell below the minimum legal standards established by the LMRA. Accordingly, for the reasons discussed above, IT IS HEREBY ORDERED THAT the NFLPA's motion to dismiss is GRANTED as to Johnson's duty of fair representation claims and his claim for declaratory relief, and DENIED as to Johnson's LMRDA claim. Johnson's petition to vacate the arbitral award is DENIED, and the arbitral award is therefore CONFIRMED.

IT IS FURTHER ORDERED THAT the parties shall submit a joint letter to the Court no later than Thursday, October 18, 2018 regarding proposed next steps with respect to Plaintiff's remaining LMRDA claim and Plaintiff's unanswered claims against the NFLMC.

The Clerk of Court is respectfully directed to terminate the motions pending at docket numbers 107 and 108.

SO ORDERED.

RICHARD J. SULLIVAN
United States District Judge

Dated: October 3, 2018
New York, New York

* * *

Plaintiff David Lane Johnson is represented by David R. Vance, Patrick J. Hoban, and Stephen S. Zashin, Zashin & Rich Co., L.P.A., 950 Main Avenue, 4th Floor, Cleveland, Ohio 44113.

Defendant National Football League Players Association is represented by David Greenspan, Jeffrey L. Kessler, Jonathan J. Amoona, and Isabelle Louise Mercier-Dalphond, Winston & Strawn LLP, 200 Park Avenue, New York, New York 10166.

Defendants National Football League and National Football League Management Council are represented by Daniel L. Nash, Akin Gump Strauss Hauer & Feld LLP, Robert S. Strauss Building, 1333 New Hampshire Avenue, N.W., Washington, District of Columbia 20036; Estela Diaz and Mary Christine Slavik, Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, New York 10036; and Frederick R. Nance, Jr. and Philip Michael Oliss, Squire Patton Boggs LLP, 4900 Key Tower, 127 Public Square, Cleveland, Ohio 44114.